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No. _____

IN THE

Supreme Court of the United States

October Term, 1987

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC, a Washington corporation, et al.,

Petitioner,

v.

FRANK FORREST, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a price-fixing scheme by union representatives appointed to the Washington State Apprenticeship Training Council requiring nonunion contractors to pay their apprentices union wage rates in order to obtain state approval for

apprenticeship training programs was completely exempt from antitrust liability as "state action."

2. Whether a state statute merely requiring apprenticeship training programs to "contain a progressively increasing scale of wages" constituted a clearly articulated and affirmatively expressed state policy authorizing union representatives appointed to the Washington State Apprenticeship Training Council to refuse approval of nonunion apprenticeship training programs unless the employers agreed to pay their apprentices, at a minimum, union wage rates.

3. Whether unpaid representatives from organized labor and management who met on a quarterly basis for the Washington State Apprenticeship Training Council constituted a "state agency" rather than private parties.

4. Whether the undisputed fact that union representatives on the Washington State Apprenticeship Training Council delegated the setting of apprentice wage rates to unsupervised private parties deprives the union representatives' price-fixing scheme of "state action" protection.

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OPINIONS BELOW

On September 27, 1985, the District Court for the Western District of Washington at Seattle, entered an Order granting summary judgment in favor of respondents and denying appellants' summary judgment motion based upon the determination that admitted anticompetitive conduct by respondents constituted "state action." A copy of this unpublished decision is attached hereto in the Appendix at page 30a. Petitioner appealed and the Court of Appeals for the Ninth Circuit affirmed the decision in an opinion entered February 8, 1988, reported at 839 F.2d 547 (9th Cir. 1988), and attached hereto in the Appendix at page 1a. Petitioners' petition for rehearing was subsequently denied in an unpublished order dated March 8, 1988, a copy of which is attached hereto in the

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit which is the subject of this petition for writ was entered on February 8, 1988. Counsel for petitioner Washington State Electrical Contractors Association, Inc., et al. filed a timely Petition for Rehearing which was denied on March 8, 1988. Pursuant to 28 U.S.C. § 2101(c) and Rule 20.4 of the Supreme Court Rules, a petition for writ of certiorari in a civil action shall be applied for within ninety (90) days after Petition for Rehearing is denied. This petition is therefore timely filed. Jurisdiction is conferred in this Court by 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

A. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of

the United States in the district in which the defendant resides or is formed or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fee." 15 U.S.C. § 15.

B. The State of Washington Apprenticeship Training Act, RCW 49.04.010-060 (set forth in its entirety in the Appendix).

C. The Washington Administrative Code ("WAC") governing apprenticeship 296-04-165, 260, 270 (set forth in their entirety in the Appendix).

STATEMENT OF CASE

This is an antitrust action brought by nonunion or "merit shop" employers and employer organizations, Washington State Electrical Contractors Association, Inc. and others ("Merit Shop Contractors") against the State of Washington Department

of Labor and Industries and various individuals including Frank Forrest, who were appointed to the Washington State Apprenticeship Training Council ("Union Appointees").[1] Jurisdiction in the

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[1]The petitioners to this proceeding are: Washington State Electrical Contractors Association, Inc., a non-profit corporation; Collins Electric Co., a Washington corporation; The Dalford Company, a Washington corporation; PMC, Inc., d/b/a Phoenix Mechanical Contractors, Inc., a Washington corporation; Quality Enterprises, Inc., a Washington corporation; Virgil Fox Plumbing and Heating, Inc., a Washington corporation; Ed Rosendin Electric, Inc., a Washington corporation; Associated Builders and Contractors of Western Washington, Inc., a Washington non-profit corporation; Associated Builders and Contractors, Inland Pacific Chapter, Inc., a Washington non-profit corporation; The Washington Association of Plumbing-Heating-Cooling Contractors, a Washington non-profit trade association.

The respondents to this proceeding are: Frank Forrest; Mac Johnson; Harold Wilson; Lloyd

District Court for the Western District of Washington was vested pursuant to 15 U.S.C. §§ 15 and 26, the Clayton Antitrust Act; 28 U.S.C § 1331, federal question jurisdiction; 28 U.S.C. § 1337, commerce and trade regulation jurisdiction; 28 U.S.C. § 2201, authorizing declaratory judgment; and pendent jurisdiction over state law antitrust claims under RCW Ch. 19.86.

The Washington State Apprenticeship Training Council ("WSATC") is responsible for approving apprenticeship training programs in the State of Washington. RCW 49.04.010. The WSATC is comprised of "three representatives each from employer and employee organization, respectively"

(Footnote 1 continued)

Wilson; Charles Mason; G. David Hutchins; State of Washington; and State of Washington Department of Labor and Industries.

who are appointed by the Director of the Washington State Labor and Industries Department. RCW 49.04.010. These private representatives of organized labor and management continue to hold full-time jobs with their respective unions or businesses and meet only on a quarterly basis. WAC 296-04-010. For these meetings they receive travel expenses and $25.00 per day. RCW 49.04.010.

Merit Shop Contractors specifically alleged that Union Appointees, through public and private acts, engaged in unlawful price-fixing in violation of state and federal antitrust law. Union Appointees' unlawful acts included the passage of an administrative regulation, WAC 296-04-270, requiring Merit Shop Contractors to pay apprentices the same wages as union contractors.[2] This

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[2]WAC 296-04-270 stated in relevant part, "In the event an

replaced an outright ban on all "parallel" (i.e. nonunion) apprenticeship programs in the State of Washington which the WSATC had previously in place.

The "union wage" requirement was drafted by Respondent David Hutchins while he was a business representative for an electrician's union and a union representative on the WSATC. This WSATC union representative drafted the "union wage" requirement with the assistance of the attorney for the electricians' union

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(Footnote 2 continued)

apprenticeship program is proposed for an area already served by an apprenticeship program, the new program's wage scale shall be identical to or greater than that of an existing program." (See Appendix which sets out the provision in its entirety) Since all existing programs in the State of Washington are either union programs or require payment of union or prevailing wage rates, this requires nonunion contractors to pay union wage rates.

and with the union's financial assistance and support.

By denying Merit Shop Contractors the opportunity for state approval of apprenticeship programs unless they agreed to this price-fixing scheme, Union Appointees have denied Merit Shop Contractors the opportunity to adequately compete on public works projects and have denied Merit Shop apprentices access to state supervision. As a result of this anticompetitive conduct, at the time of argument only two apprenticeship training programs out of a total of 99 approved construction programs in the State of Washington were nonunion. The resulting competitive disadvantage to the Merit Shop Contractors has been estimated at $180 million per year.

However, Union Appointees have asserted that this price-fixing scheme was the affirmative act of the State of Washington

and, therefore, exempt from prosecution under federal antitrust law. This so-called "state action" exemption requires price-fixing activity to be carried out pursuant to a clearly articulated state policy and with the active supervision of the state.

Union Appointees' "state action" claim is belied by the following facts: (1) by statute, RCW 49.04.010, they were private parties representing the interests of organized labor, (2) by statute, RCW 49.04.050(5), there was no express authority for the WSATC to set an apprenticeship wage minimum; (3) by statute and in undisputed practice, neither Union Representatives or the representatives of the State of Washington who played a limited role on the WSATC, set or reviewed the union wage rates which contractors were required to pay since these were set, by

definition, by private parties engaged in collective bargaining.

Nonetheless, the Ninth Circuit affirmed the trial court's dismissal of the action based upon alleged "state action" protecting this price-fixing scheme. The Ninth Circuit's ruling was based upon the broad enabling language in the Apprenticeship Act for the State of Washington as well as alleged participation in the scheme by a supervisor appointed by the Director of Labor and Industries for the State of Washington.

The Ninth Circuit, however, failed to consider that the state legislature expressly ignored wages when it set up legislatively-defined minimums for apprenticeship standards. In addition, the Ninth Circuit ignored Union Appointees' admission that no one supervised the actual price-fixing which the scheme allowed. As a result, the Ninth Circuit's application

of the "state action" exemption to the facts of this case conflicts with rulings of this Court.

V. REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the Court of Appeals for the Ninth Circuit has decided an important question of federal law regarding the "state action" exemption to federal antitrust law in direct conflict with applicable decisions of the United States Supreme Court. Pursuant to Rule 17.1(c) of the Rules of the Supreme Court, a review on writ of certiorari is appropriate.

The so-called "state action" exemption to federal antitrust liability is an issue of national importance. See, Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-92 (1975). The issue directly involves a conflict between the federal and state governments requiring resolution by the highest court in the land. The issue is

even more important because the ability of nonunion contractors in the State of Washington to train apprentices is at stake. Specifically, Union Representatives have required Merit Shop Contractors to pay their apprentices union wage rates in return for state approval of apprentice training programs. The Ninth Circuit's erroneous conclusion that "state action" immunity protects an unsupervised price-fixing scheme carried out by private interest representatives on a state-sponsored board, directly conflicts with the consistent and unambiguous rulings of this Court starting with California Liquor Dealers v. Midcal Aluminum, 455 U.S. 97 (1980) through the recent decision of 324 Liquor Corporation v. Duffy, 479 U.S. 335, 107 S. Ct. 720 (1987).

Contrary to the Ninth Circuit's ruling, "state action" immunity is conferred only when the state legislature affirmatively

decides "that competition is not the summum bonum in a particular field and deliberately attempts to provide an alternate form of public regulation. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30 (1st Cir.), cert. denied, 400 U.S. 850 (1970). According to the United States Supreme Court, a state does not confer antitrust immunity upon an agency merely by delegating plenary powers to a political subdivision.

> Acceptance of such proposition -- that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances -- would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedence require.

Community Communications Company, Inc. v. City of Boulder, 455 U.S. 40, 56 (1982).

The state legislation must, instead, expressly set forth the political agency's

or subdivision's authority to set rates or wages. At a minimum, the legislature's intent to establish an anticompetitive regulatory program must be clear. Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 63-65 (1985).

In addition even with a clearly articulated state policy, the exemption requires active state supervision to insure that the anticompetitive activity is being carried out under the state's auspices. This Court has repeatedly and uniformly applied the "active state supervision" requirement to rate-making bureaus comprised of private individuals even though these bureaus were established by state law and were required by law to set wage rates.

> This active supervision requirement insures that a state's actions will immunize the anticompetitive conduct of private parties only when the "state has demonstrated its commitment to a program through its exercise of

> regulatory oversight." See, 1.P Areeda & D. Turner, Antitrust Law § 213(a) (p. 73) (1978).

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 61 n. 23 (1985).

While the "active state supervision" requirement was not required by this Court in the companion case of Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 n. 10 (1985), that case involved anticompetitive conduct by a municipality engaged in the traditional municipal function of providing sewage service. Because municipalities have built-in safeguards, active supervision by the state is not necessary. However, as this Court pointed out in Town of Hallie:

> . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or

> no danger that it is involved in a private price-fixing arrangement.

Town of Hallie, supra, 471 U.S. at 47 (emphasis in original.)

This Court has, therefore, not broadened the definition of a "public agency" to cover private parties who are acting within the scope of a legislative enactment, even if those private parties are authorized to engage in rate-making.

> The state simply authorizes price-setting and enforces the prices established by private parties. The state neither establishes prices nor reviews the reasonableness of the price schedule, nor does it regulate the terms of fair trade contracts. The state does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As Parker teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."

California Liquor Dealers v. Midcal Aluminum, 455 U.S. 97, 106 (1980).

More recently, in 324 Liquor Corporation v. Duffy, 479 U.S. 335, 107 S. Ct. 720 (1987), this Court determined that, even though the New York State Liquor Authority was involved in and condoned price-fixing by private liquor wholesalers, the Authority's failure to supervise the actual price-fixing by private parties deprived the scheme of antitrust exemption:

> Just as clearly, however, New York's liquor pricing system is not actively supervised by the state. As in Midcal, the State simply authorizes price setting and enforces the prices established by private parties. New York "neither establishes prices nor reviews the reasonableness of price schedules." New York "does not monitor market conditions or engage in any 'pointed reexamination' of the program." A wholesaler sets its own "posted" prices; the State does not control month-to-month variations in posted prices. Nor does the State supervise the wholesaler's decision to "post off" or the amount of the "post off" the

> corresponding decrease, if any, and the bottle price, or the frequency under which a wholesaler posts off. The State has displaced competition among liquor retailers without substituting an adequate system of regulation.

Duffy, supra, 107 S. Ct. at 732-33 (footnotes and citations omitted).

Thus, time and time again, this Court has closely examined rate-making committees comprised of unelected representatives and ruled that active state supervision of the resulting activity is absolutely necessary. From Midcal Aluminum to Duffy, this Court has not shied away from determinations that the "state action" immunity does not apply even if the price-fixing scheme is completely authorized by the state.

In the present case, the Ninth Circuit misapprehended this Court's controlling case law setting forth the requisite elements of a "clearly articulated state policy" and "active state supervision."

According to the Ninth Circuit, the first element was present because of the Washington State Apprenticeship Act, RCW 49.04 et seq. RCW 49.04.050 in particular sets forth the requisite elements of state apprenticeship agreements. One of the requisite elements is a "statement of the progressively increasing scale of wages to be paid the apprentice." RCW 49.04.050(5).

However, the statute is silent regarding any minimum wage scale or the WSATC's ability to set it. Examination of the remainder of RCW 49.04.050 reveals that express minimum standards for several aspects of the apprentice training program are set forth, with the exception of apprentice wages. The statute expressly defines minimum requirements ("which shall not be less than . . .") for several elements of an apprenticeship training program including employment hours per

year, instruction hours per year, and apprentice age.[3]

The Washington State legislature, however, did not follow the requirement of a wage statement with any provision that wages "shall not be less than" a given

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[3] RCW 49.04.050 (emphasis supplied) provides in part that the "standards of apprenticeship agreements are as follows:

(1) A statement of the trade or craft to be taught and the required hours for completion of apprenticeship which shall be not less than two thousand hours of reasonably continuous employment.

* * *

(3) A statement of the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction which instruction shall not be less than one hundred forty-four hours per year.

(4) A statement of the age of the apprentice which may not be less than sixteen years of age."

(See Appendix)

amount. The legislature merely provided that all apprentice agreements must contain a progressively increasing scale of wages to be paid the apprentice.

As a result, RCW 49.04.050 is exactly the type of general legislative authorization this Court has determined fails to meet the "clearly articulated state policy" requirement. See Community Communications Company, Inc. v. City of Boulder, 455 U.S. at 56. At oral argument before the trial court, the Assistant Attorney General candidly admitted that express legislative authorization was absent in this case:

> I think that Council given the legislative authorization it has, might be in some trouble if it tried to set those wages directly, say the minimum has to be X. I think it might need more legislative authorization to do that.

As a result, the Ninth Circuit's determination conflicts with controlling

decisions of this Court. Not only is there no state law authorization for the price-fixing scheme, but also there is clearly no legislative authorization for setting apprenticeship training program wage rates at a level equal to or greater than union wage rates. Absent such a clearly articulated state policy, the Ninth Circuit determination is erroneous as a matter of law.

Of even more concern is the Ninth Circuit's failure to follow controlling precedent governing the second element of "active state supervision." A former member of the WSATC explained the wage-setting process as follows:

> The Council does not review the economics of the union or joint [sic] administered plans. When a collective bargaining agreement calls for a change in the journeyman rate, that means that there will be a change in the apprenticeship rate since apprenticeship rates are usually stated as a percentage of the journeyman rate. The Council does

> no independent review for such changes as long as they are the product of collective bargaining.

Respondents do not dispute this fact. The price-fixing scheme, placing the ability to fix apprentice wage rates in the hands of private parties, was never questioned by the WSATC. At oral argument in the trial court, the trial court asked Union Appointees' counsel to cite any relevant state law allowing WSATC to set wage rates. The Assistant Attorney General candidly stated:

> And the Council does not [set the wages for apprentices] . . . . They don't want to be in the position of directly setting those wages on a case by case basis. It is administratively impossible for them. It's probably not prudent to add the state setting wages in the market place. So what did they do? They looked around for a benchmark they could use.
>
> * * *
>
> The Council looked at those, looked at the wages and they said those collective bargaining wages

> are sufficiently high to protect the interests of the apprentices.
>
> * * *
>
> The Council doesn't set those wages. It doesn't participate in those negotiations at all. The labor market in the collective bargaining context sets those wages.

It is, therefore, undisputed that the price-fixing scheme in this case mirrors the kinds of price-fixing schemes this Court examined by this Court in the decisions of Midcal Aluminum, Southern Motor Carriers Rate Conference, and 324 Liquor Corp. v. Duffy, supra. In all three cases, representatives of private interests were placed on rate-making boards pursuant to state law. Only in Southern Motors Carriers Rate Conference, where there was active state review of the rates set by private parties, did this Court uphold the price-fixing scheme.

The Ninth Circuit in this case determined that the State of Washington,

through a supervisor appointed by the Director of Labor and Industries, supervised this price-fixing activity. However, there no evidence that such supervision actually occurred. Instead, as discussed at length above, all the parties to this action acknowledged that no one reviewed, criticized, or modified the apprentice wage rate set by a private collective bargaining agreement. The Ninth Circuit's failure to properly apply the Duffy decision in this very important area of exemption to federal antitrust law, requires this Court to properly apply controlling case law and to advise the Union Appointees that they are not exempt from federal antitrust law.

The price-fixing scheme by these private representatives of organized labor undermines two significant federal interests: the control of anticompetitive conduct and the encouragement of

apprenticeship training programs for the construction market. For these Union Representatives to claim that they are exempt from federal antitrust law because the State of Washington purportedly authorized and supervised the payment of union wage rates by nonunion contractors is contrary to reason, to the undisputed facts, and contrary to the controlling decisions of this Court.

VI. CONCLUSION

Because the federal question raised is of the utmost importance and the Court of Appeals for the Ninth Circuit has decided the federal question in conflict with the decisions of this Court, petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and

opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted this 6th day of June, 1988.

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APPENDIX 1

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC, a Washington corporation, et al., Plaintiffs-Appellants,

v.

FRANK FORREST, Mac Johnson, Harold Wilson, Lloyd Wilson, Charles Mason, G. David Hutchins, State of Washington, and State of Washington, Department of Labor & Industries, Defendants-Appellees.

No. 85-4232

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Sept. 9, 1987.

Decided Feb. 8, 1988

Jerry B. Edmonds and Judd H. Lees, Bellevue, Wash., for plaintiffs-appellants.

Robert G. Swenson, Asst. Atty. Gen., Office of the Atty. Gen., Seattle, Wash., for defendants-appellees.

Appeal from the United States District Court for the Western District of Washington.

Before GOODWIN* and BEEZER, Circuit Judges, and NIELSEN,** District Judge.

GOODWIN, Circuit Judge:

A trade association of nonunion electrical contractors and others sued the State of Washington Department of Labor and Industries, the individual members of the Washington State Apprenticeship and Training Council and others for antitrust damages, injunctive and declaratory relief. The plaintiffs appeal a summary

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*This case was argued before Judges Kennedy, Beezer and Nielsen. Judge Goodwin was drawn to replace Judge Kennedy. He has read the briefs, reviewed the record and listened to the tape of oral argument held on September 9, 1987.

**The Honorable Leland C. Nielsen, United States District Judge, Southern District of California, sitting by designation.

judgment holding that the state department of labor and the apprenticeship council and their members are immune from antitrust liability under the state-action doctrine first explained in the California raisin cartel case, Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). We affirm.

The Council is established by the State of Washington's Apprenticeship Act. Wash. Rev. Code § 49.04.010 et seq. The Council consists of seven voting members. The state Director Labor and Industries appoints six Council members, divided evenly among representatives of employees and employers. The Governor appoints a public member to the Council. In addition, two state officials serve without vote as ex officio members of the Council. Wash. Rev. Code § 49.04.010.

The Act directs the Council to "[e]stablish standards for apprenticeship

agreements in conformity with the provisions of this chapter" and to "issue such rules and regulations as may be necessary to carry out the intent and purposes of this chapter." Wash. Rev. Code § 49.04.010. An apprenticeship agreement is a written agreement between an employer or association of employers and an individual apprentice or organization of employees describing the conditions of an apprenticeship and the program of apprenticeship training in the particular trade or craft. Wash. Rev. Code. §§ 49.04.050, 060. The Act itself contains standards for apprenticeship agreements, including requirements concerning length of an apprenticeship, allocation of apprenticeship hours to work and instruction, minimum age, Wash. Rev. Code §§ 49.04.050(1)-(4), and a requirement of a "progressively increasing wage scale," Wash. Rev. Code § 49.04.050(5).

One of the Council's functions is to approve apprenticeship training program agreements submitted by organizations seeking to become apprenticeship program sponsors. In 1980, the Council promulgated Regulation 296-04-270. Wash. Admin. Code § 296-04-270 (1983). Regulation 296-04-270 sets forth certain requirements and establishes standards by which proposed apprenticeship agreements would be evaluated by the Council. This appeal centers on a subpart of Regulation 296-04-270. In its current form, Subpart (2)(c) provides as follows:

> The statement of the progressively increasing scale of wages, RCW 49.04.050(5), shall provide for a set percentage of a specified journeyman wage. In no event shall the specified journeyman wage from which the apprentice's percentages are computed fall below eighty percent of the established prevailing basic wage computed by the industrial statistician of the department of labor and industries has not computed such a prevailing basic wage, the prevailing basic

> wage for the craft for the area set by the United Stated Department of Labor pursuant to the Davis-Bacon Act, 40 U.S.C. § 276, may be used.

Wash. Admin. Code. § 296-04-270(2)(c) (1986).[1] The established prevailing

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[1] The Council has amended Subpart (2)(c) since the lawsuit began. Subpart (2)(c) as amended now governs the parties; it raises the same issues as before. In its original form Subpart (2)(c) provided:

> The statement of the progressively increasing scale of wages (RCW 49.04.050(5)) shall provide that the entry level wage for all apprentices shall be at least a percentage of the journeyman scale set by the applicable collective bargaining agreement or at least a percentage of the prevailing wage for the craft for the area set by the United Stated Department of Labor pursuant to the Davis-Bacon Act (40 USC Sec. 276) where no collective bargaining agreement is in effect. In the event an apprenticeship program is proposed for an area already served by an apprenticeship program, the new program's wage scale shall be identical to or greater than that of an existing program. In the event an apprenticeship program is proposed for a craft or area in which there is no collective bargaining agreement, no

basic wage reflects the wage set by collective bargaining in the area. In essence, Regulation 296-04-270(2)(c) prescribes a minimum wage for apprentices based on prevailing rates set by unions and union employers.

Appellants claim Regulation 296-04-270(2)(c) adversely affects their ability to compete with union employers for public construction contracts by fixing prices in violation of the federal antitrust laws. They contend that the regulation forces them to make an economically impossible choice. If the nonunion employers comply with the

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(Footnote 1 continued)

> Davis-Bacon Act prevailing wage, and no existing apprenticeship program, the applicant shall request the statistician of the department of labor and industries set a prevailing wage for the specific area and craft to be incorporated into the proposed agreement.

regulation, they have to pay union wages to their nonunion apprentices on both public and private contracts, thereby inflating their wage scales for nonunion journeymen as well. If the nonunion employers fail to comply with the regulation, they forego Council approval.

Without Council approval of its apprenticeship agreement, an employer must pay journeyman rates for apprentices on public contracts. Wash. Rev. Code. § 39.12.021. Employers with Council-approved apprenticeship agreements, however, may pay their apprentices lower wage rates as provided in the apprenticeship agreement itself. Id. Because union employers pay their apprentices union wage rates anyway, they routinely satisfy Regulation 296-04-270(2)(c) and obtain Council approval of their apprenticeship agreements.

Appellants argue that Regulation 296-04-270(2)(c) thus prevents them from bidding competitively for public contracts against union employers. Appellants contend that the statutory scheme is defective on two counts: improper delegation and inadequate supervision.

Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, is the starting point in any analysis involving the state-action immunity doctrine. In Parker, the Supreme Court relying on principles of federalism and state sovereignty, held that Congress did not intend the Sherman Act "to restrain a state or its officers or agents from activities directed by its legislature" that restrict or otherwise regulate competition. Id. at 350-51, 63 S. Ct. at 313; see Southern Motor Carriers Rate Conf. v. United States, 417 U.S. 48, 55-56, 105 S. Ct. 1721, 1725-26 85 L.Ed.2d 36 (1985); Town of Hallie v. City of Eau Claire, 271

U.S. 34, 38-39, 105 S. Ct. 1713, 1716-=17, 85 L.Ed.2d 1498, 1505 (9th Cir. 1986), cert. granted, ___ U.S. ___, 108 S. Ct. 65, 98 L. E.2d 29 (1987). Thus, if a particular act is an action of the state, it is generally exempt from the operation of federal antitrust laws. Hoover v. Ronwin, 466 U.S. 558, 567-68, 104 S. Ct. 1989, 1994-95, 80 L. Ed.2d 590 (1984).

In the years following the decision in Parker, the Supreme Court has refined the scope of the state-action doctrine. The legislative actions of a state legislature and the "legislative" decisions of a state supreme court have been held exempt from antitrust liability as state action. Hoover, 466 U.S. at 567-68, 104 S. Ct. at 1994-95 (citing Bates v. State Bar of Arizona, 433 U.S. 350, 360, 97 S. Ct. 2691, 2697, 53 L. Ed.2d 810 (1977)). However, when the anticompetitive activity in question is not directly that of the state

legislature or supreme court, but is carried out by others pursuant to state authorization, "closer analysis" is required to determine whether the activity is attributable to the state and whether state-action immunity applies. Hoover, 466 U.S. at 568, 104 S. Ct. at 1995; Patrick, 800 F.2d at 1505.

Under certain conditions, even anticompetitive activities by private parties may qualify for Parker state-action immunity. Southern Motor Carriers, 471 U.S. at 57, 105 S. Ct. at 1726. The Supreme Court has established a two-part test to determine whether Parker immunity is available to private parties, and to municipalities or state agencies regulating the activity of private parties. Southern Motor Carriers, 471 U.S. at 57, 105 S. Ct. at 1726; California Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 105-6, 100 S. Ct. 937, 943, 63 L. Ed.2d 233 (1980);

Llewellyn v. Crothers, 765 F.2d 769, 773 (9th Cir. 1985). First, we must determine whether the challenged activity is pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation. Southern Motor Carriers, 471 U.S. at 57, 105 S. Ct. at 1727; Hoover, 466 U.S. at 569, 104 S. Ct. at 1995; Midcal Aluminum, 445 U.S. At 105, 100 S. Ct. at 943. Second, we must determine the extent to which the state is required to supervise the challenged conduct.

This "active supervision" requirement itself involves two separate inquiries. Before determining whether the state does in fact actively supervise the anticompetitive conduct of its agents, we must first determine whether the active supervision requirement applies to the anticompetitive actors in the particular case presented. the state must actively

supervise anticompetitive conduct by private parties. Southern Motor Carriers, 471 U.S. at 57, 105 S. Ct. at 1727. Active state supervision, however, is not a prerequisite to state-action immunity when a municipality engages in anticompetitive activity. Town of Hallie, 471 U.S. at 47, 105 S. Ct. at 1720. Thus,, in this case, we are called upon to determine whether the Council must be actively supervised by the state or, like a municipality, must only satisfy the first part of the state-action immunity test, that is, the Council is acting pursuant to an affirmatively expressed directive of the state legislature.

At the outset, we reject defendant's contention that the Council's actions are in effect actions of state legislature as sovereign and therefore "absolutely immune" from antitrust scrutiny. A clear distinction exists between acts undertaken

by the legislature or state supreme court and acts delegated to and carried out by others "pursuant to state authorization." Hoover, 466 U.S. at 568, 104 S. Ct. at 1995, Only the former are absolutely immune. Id. at 567-68, 104 S. Ct. at 1994-95, citing Parker, 317 U.S. at 350-51, 63 S. Ct. at 313. The legislative actions of a state legislature or supreme court do not require extensive scrutiny to determine whether they are guided by an articulated and express state policy or are conducted under the supervision of the state because such actions constitute "those of the State" itself. 466 U.S. at 567-68, 104 S. Ct. at 1995. Such scrutiny, however, is required when agents of the state rather than the state itself conduct anticompetitive activities. The Supreme Court has, for example, closely scrutinized a municipality regulating the cable television industry, Community

Communications Co. v. Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed.2d 810 (1982), a private price-fixing arrangement authorized by state statute, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed.2d 233 (1980), and a state administrative board regulating new franchises, New Motor Vehicle Bd of California v. Orrin W. Fox Co., 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed.2d 361 (1978), to determine whether the activity in issue was carried out pursuant to state authorization. The Council's exercise of delegated rulemaking authority clearly fits within this latter type of activity, and thus, must satisfy the two-part test for state-action immunity. Cf. Town of Hallie, 471 U.S. at 46 n. 10,, 105 S. Ct. at 1720 n. 10 (retaining clear and express state authorization requirement while suggesting active supervision requirement may not apply to state

agencies); Patrick, 800 F.2d at 1507 (acts of a state agency official are immune if "taken pursuant to express state policy").

We now consider the first part of the state action immunity test: whether the Council's anticompetitive actions are firmly based on a clearly articulated and affirmatively expressed policy of the State of Washington. To satisfy this "clear articulation" requirement, the Council must demonstrate not only the existence of a state policy to displace competition with regulation in the relevant market, but also that the legislature contemplated the kind of anticompetitive actions at issue. Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430, 1433 (9th Cir. 1984). State policy, however, may be inferred from the breadth of the Council's statutory authority to regulate. The Washington Apprenticeship Act neither must detail nor compel the specific

anticompetitive actions of the Council to "clearly articulate" a state policy to displace competition with regulation in the apprenticeship labor market. Town of Hallie, 471 U.S. at 43-46, 105 S. Ct. at 1718-20 (legislatures cannot be expected to catalog all of the anticipated effects of an apprenticeship statute); Grason Elec. v. Sacramento Mun. Utility Dist., 770 F. 2d 833, 836-37 (9th Cir. 1985). Further, a showing that the restraint in issue was a necessary or reasonable consequence of engaging in anticompetitive activity authorized by the legislature may satisfy the "clear articulation" requirement. California Aviation, Inc. v. City of Santa Monica, 806 F.2d 905, 907 (9th Cir. 1986).

Washington's statutory scheme clearly grants the Council broad regulatory powers, including the authority to issue the challenged type of wage regulation. The

Washington Apprenticeship Act grants the Council regulatory authority in broad terms:

> The apprenticeship council with the consent of employee and employer groups shall: (1) establish standards for apprenticeship agreements in conformity with the provisions of this chapter; (2) issue such rules and regulations as may be necessary to carry out the intent and purposes of this chapter, including a procedure to resolve an impasse should a tie vote of the council occur; and (3) perform such other duties as are hereinafter imposed.

Wash. Rev. Code. § 49.04.010. The Act itself sets out several standards for apprenticeship agreements that outline the "intent and purposes" of the statutory scheme. Statutory standards require an apprenticeship agreement to state the trade or craft to be taught, the duration of the apprenticeship, the stages and skills learned as the apprentice progresses, the apportionment of the apprenticeship between work and instruction, and the probationary period during which either employee or

employer may request termination of the apprenticeship agreement. Wash. Rev. Code § 49.04.050. Moreover, the Act imposes several restraints similar to the Council regulation at issue. The Act requires that the apprenticeship duration be at least 2,000 hours, the apportionment of work and instruction in the apprenticeship agreement to provide for at least 144 hours per year of instruction, the apprentice to be at least 16 years of age, and the employer to pay a progressively increasing scale of wages to an apprentice. Id. A registered apprenticeship program must also comply with the Act's statutory affirmative action requirements. Wash. Rev. Code §§ 49.04.100-.110.

The Act creates an apprenticeship structure with reciprocal benefits and burdens to the employer and employee in a registered apprenticeship program. Though Washington has chosen not to impose the

Act's requirements on all apprenticeship programs, Wash. Rev. Code § 49.04.070, the Act outlines a comprehensive apprenticeship program, and expressly directs the Council to provide further specific rules, standards, and regulations to complete the statutory scheme. Cf. Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc., 753 F.2d 790, 793 (9th Cir. 1985) (statutory scheme granting limited discretion to municipality to restrict competition in a manner consistent with the pertinent legislation). In particular, Regulation 296-04-270's wage rule is similar in kind to the restraints imposed by the legislature itself. A minimum wage provision or similar mechanism is a "foreseeable result" of the Council's responsibility to ensure that the statutory directive of a progressively increasing scale of wages is not avoided nor meaningless. Town of Hallie, 471 U.S. at

42, 105 S. Ct. at 1718. This court has recognized that a state legislature must be assumed to have contemplated the use of restraints on competition that are a reasonable consequence or necessary corollary of anticompetitive restrictions authorized by the legislature. California Aviation, 806 F.2d at 907; Lorrie's Travel & Tours, 753 F.2d at 793. the Act's statutory standards were not intended to be the exclusive standards governing apprenticeship programs in Washington. The Council's grant of authority "to carry out the intent and purposes" of the Act's apprenticeship scheme implies an authority to develop rules and regulations elaborating the general statutory standards such as the wage regulation at issue.

Our next inquiry regarding the application of the active supervision requirement raises some significant questions. Appellees contend that the

active supervision requirement for state action immunity does not apply to the Council as a state agency. In Town of Hallie, the Supreme Court noted that the active supervision requirement may not apply to state agencies. 471 U.S. at 46 n. 10, 105 S. Ct. at 1720 n. 10. This result may follow from the state agency's role as implementor and administrator of state legislative programs and policy. See, Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 50-52, 66, 105 S. Ct. 1721, 1723-34, 1731, 85 L. Ed.2d 36 (1985) (describing statutory system of state agency review of privately sponsored rate proposal, and noting Government's acknowledgement that the "States, through their agencies, actively supervise the conduct of private parties"). This court, in Patrick v. Burget, did not require active supervision of a state medical board of examiners to find that an individual

board member's actions were immune from antitrust liability. 800 F.2d at 1506-07. Though the medical examiners board was composed of private doctors authorized by state statute to conduct peer review proceedings, we concluded that "[a]ctions within the scope of a state official's authority, taken pursuant to express state policy, which are contemplated by the statutory scheme, are actions of the state and therefore immune." Id. at 1507.

While we note the similarity between the status of the individual members of the medical board on Patrick and the members of the Council, we also perceive certain problems when a state agency is staffed with individuals who represent private interests. The Supreme Court had described the supervision requirement as serving "essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant

to state policy." Town v. Hallie, 471 U.S. at 46, 105 S. Ct. at 1720. Moreover, the active supervision requirement also prevents a state from insulating private activity from federal antitrust laws "by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." Southern Motor Carriers, 471 U.S. at 57, 105 S. Ct. at 1727 (quoting Midcal, 445 U.S. at 106, 100 S. Ct. at 943).

Because we conclude that the Council's activities are actively supervised by the state, it is not necessary to determine whether the Council is a state agency exempt from the active supervision requirement. The Act itself provides for nearly constant state supervision of the Council. Two state officials are ex officio members of the Council. Wash. Rev.

Code § 49.04.010.[2] The Council also submits an annual report to the state director of labor and industries on its activities and findings. Id. The Act also creates the position of supervisor of apprenticeship within the state department of labor and industries to advise and monitor the Council. Wash. Rev. Code § 49.04.030. The supervisor of apprenticeship is appointed by and deputized as an assistant director to the state director of labor and industries. The Act provides:

> Under the supervision of the director of labor and industries and with the advice and guidance of [the Council], the supervisor shall: (1) Encourage and promote . . . apprenticeship agreements

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[2]These ex officio members are state officials responsible for programs related to the apprenticeship system - the state public employment service and the vocational education commission. Wash. Rev. Code § 49.04.010. Their membership on the Council allows coordination between the apprenticeship system and other state programs with "overlapping" jurisdictions.

> conforming to the standards established by or in accordance with [the Act] . . .; (2) act as secretary of [the Council] . . . (3) when so authorized by [the Council], register . . . apprenticeship agreements . . . (5) terminate or cancel any apprenticeship agreements in accordance with the provisions of such agreements; and who (6) may act to bring about the settlement of differences arising out of the apprenticeship agreement where such differences cannot be adjusted locally.

Wash. Rev. Code § 49.04.030. It is the supervisor, a state official, rather than the Council who generally enforces and monitors compliance with apprenticeship agreements, including the wage regulation. The Council's activities under the Apprenticeship act, as well as the activities of private parties to particular apprenticeship agreements are monitored and supervised by the state, through the supervisor, the state director of labor and industries and their personnel. Wash. Rev. Code § 49.04.030. The supervisor retains

authority to reject apprenticeship agreements. Wash. Admin. Code 296-04-270(3)(a). Cf. Southern Motor Carriers, 471 U.S. at 50-52, 65, 105 S. Ct. at 1723-24, 1731 (granting state action immunity to "rate bureaus," private associations of common carriers, that submitted joint rate proposals to state regulatory agencies, noting the state agencies' authority to "accept, reject or modify any recommendation"). Thus, though the Council's regulatory authority is extensive, it is exercised in the context of a structured and supervised regulatory system. The statutory scheme clearly requires the interaction of the state department of labor, through the supervisor, and the Council in developing an apprenticeship system with the active participation of employer, employee and the state.

The plaintiffs' challenge ot the apprenticeship system for inadequate supervision has a hollow sound when the scheme is examined. The plaintiffs are not injured by any want of supervision. It is the supervision and monitoring of wages of apprentices by the state that inflicts the economic disadvantage upon plaintiffs. Without the state supervision, plaintiffs would probably not be interested in litigation of the question.

The Supreme Court's recent decision in 324 Liquor Corp. v. Duffy, ___ U.S. ___, 17 S. Ct. 720, 93 L. Ed.2d 667 (1987), does not alter our conclusion. In 324 Liquor, the New York statute simply allowed individual wholesalers of certain beverages to "post" monthly price schedules, and prohibited retailers from selling below the posted price plus a certain markup percentage. The state agency in 324 Liquor did not review or establish the posted

wholesale prices. Id. 107 S.Ct. at 725-26. Nor did the state monitor market conditions, supervise the private wholesalers' posting decisions, or "engage in any 'pointed reexamination' of the program." Id. at 726 (quoting Midcal, 445 U.S. at 106, 100 S. Ct. at 943). In contrast, under the Washington apprenticeship system, the state through the supervisor, the apprenticeship division of the state department of labor, and the Council in effect exercises its regulatory authority in a coordinated fashion.

The judgment of the district court is AFFIRMED.

APPENDIX 2

No. C83-626V

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Plaintiffs,

vs.

FRANK FORREST, et al.

Defendants.

ORDER

Having considered the motion of defendants for summary judgment, the cross-motion of plaintiffs for partial summary judgment, and the motion of plaintiffs to compel, together with the memoranda, affidavits and exhibits

submitted by counsel, the Court now finds and rules as follows:

1. Both motions for summary judgment concern the applicability of the doctrine enunciated in Parker v. Brown, 317 U.S. 341 (1943), to the actions of the defendants in this case. The Parker doctrine, also referred to as the state action exemption, immunizes the sovereign acts of states from the federal antitrust laws. Id. at 350-51. Defendants contend that Parker requires that this action be dismissed whereas plaintiffs assert that the Parker exemption is not applicable under the facts of this case.

2. Plaintiffs are open shop contractors or associations comprised of open shop contractors. An open shop contractor is one which employs non-union labor and does not have a collective bargaining agreement with its employees. Defendants include the State of Washington,

the Department of Labor and Industries of the state and several individual members of the Washington State Apprenticeship Training Council ("WSATC" or the "Council"). The individual defendants are or were union representatives on the Council.

3. WSATC has not been named as a defendant but appears to be the real target of this lawsuit. It was initially composed of six members, each appointed by the Secretary of the Department of Labor and Industries pursuant to Washington's Apprenticeship Act, R.C.W. 49.04.010 et seq. The Act was amended in 1982 to add a seventh member to be appointed by the governor. Id. Of the six members appointed by the Secretary, three are from employer organizations and three from employee organizations. None of the representatives of the employer

organizations have been named as defendants in this lawsuit.

4. One of the functions of the Council is to approve apprenticeship training program agreements. The primary complaint of plaintiffs is that they have been and are unable to obtain approval of their apprenticeship training programs because of a regulation promulgated by the Council. That regulation requires that apprenticeship agreements conform to the following standard:

> The statement of the progressively increasing scale of wages (RCW 49.04.050(5)) shall provide that the entry level wage for all apprentices shall be at least a percentage of the journeymen scale set by the applicable collective bargaining agreement or at least a percentage of the prevailing wage for the craft for the area set by the United States Department of Labor pursuant to the Davis-Bacon Act (40 USC Sec. 276) where no collective bargaining agreement is in effect. In the event an apprenticeship program is proposed for an area already served by an apprenticeship program, the new

> program's wage scale shall be identical to or greater than that of an existing program. In the event an apprenticeship program is proposed for a craft or area in which there is no collective bargaining agreement, no Davis-Bacon Act prevailing wage, and no existing apprenticeship program, the applicant shall request the statistician of the department of labor and industries set a prevailing wage for the specific area and craft to be incorporated into the proposed agreement.

W.A.C. 296-04-270(c).

5. Plaintiffs contend that this wage parity regulation is a per se, price-fixing violation of the antitrust laws. Plaintiffs assert that the regulation, combined with RCW 39.21.021, forces them either to pay union wages to their apprentices on both public and private contracts or to be rendered non-competitive in bidding on public projects.

6. R.C.W. 39.12.021 provides:

> Apprenticeship workmen employed upon public works projects for whom an apprenticeship agreement has been

> registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any workman for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journeyman, and, therefore, shall be paid at the prevailing hourly rate for journeymen.

Plaintiffs can obtain approval for their apprenticeship training programs only if they agree to set for apprentices the wage rate which is provided for in the wage parity regulation. Without this approval, plaintiffs contend that they cannot compete for public contracts.

7. There appears to be little doubt that the wage parity regulation is a wage setting regulation. Defendants contend, however, that they are immune from the antitrust laws because the legislature hs

granted them authority to regulate the wages of apprentices.

8. R.C.W. 49.04.010 provides that the Council shall:

> (1) Establish standards for apprenticeship agreements in conformity with the provisions of this chapter; (2) issue such rules and regulations as may be necessary to carry out the intent and purposes of this chapter, including a procedure to resolve an impasse should a tie vote of the council occur; and (3) perform such other duties as are hereinafter imposed.

R.C.W. 49.04.050 sets forth the standards that are to be contained in all apprenticeship agreements.

R.C.W. 49.04.050(5) provides that apprenticeship agreements shall contain among many other materials:

> (5) A statement of the progressively increasing scale of wages to be paid the apprentice.

9. Defendants contend that R.C.W. 49.04.010 and .050(5) together

provide the authority for the Council's enacting the wage parity regulation despite any anticompetitive effect that it might have. They contend that their action in promulgating the wage parity regulation is hence exempt under the Parker doctrine.

10. In Parker the Supreme Court held that the federal antitrust laws do not apply to the sovereign acts of states. Id. at 350-51. Decisions of a state legislature of of a state supreme court, acting legislatively, are clearly exempt from the Sherman Act liability. Hoover v. Ronwin, 80 L.Ed.2d 590, 599 (1984).

11. Closer analysis is required, however, when the activity at issue is not directly that of the legislature or supreme court but is carried out by others pursuant to state authorization. Id. Government entities, whether state agencies or subdivisions of a state, are not, simply by reason of their status, exempt from the

antitrust laws. City of Lafayette, Louisiana, et al. v. Louisiana Power & Light Company, 435 U.S. 389, 409 (1978). The Supreme Court recently confirmed that the circumstances in which Parker immunity is available to private parties, and to state agencies or officials regulating the conduct of private parties, are defined most specifically by California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). See, Southern Motor Carriers Rate Conference v. United States, ___ U.S. ___, 85 L.Ed.2d 36, 45 (1985). Midcal set forth a two prong test for determining whether state regulation of private parties is shielded from the antitrust laws. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy. Second, the state must actively supervise any private anticompetitive conduct. 445 U.S. at 105.

Recent Supreme Court and Ninth Circuit decisions have further explained and refined this two prong test.

12. With respect to the first prong, defendants must show that they were acting pursuant to a clearly articulated and affirmatively expressed state policy and that the legislature contemplated that the policies might be implemented by anticompetitive conduct. Grason Electric Company v. Sacremento Municipal Utility District, No. 84-2395, slip op. 6 (9th Cir. September 4, 1985), citing, Tom Hudson & Associates, Inc. v. City of Chula Vista, 746 F.2d 1370, 1373 (9th Cir. 1984). It is not necessary for the state legislature to state explicitly that it contemplates conduct by the regulators that would have anticompetitive effects. It is sufficient that anticompetitive effects would logically result from the broad authority granted by the legislature to the

regulators. Town of Hallie, ___ U.S. at ___, 85 L. Ed.2d at 31; Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1415 (9th Cir. 1985). The state may adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties. Southern Motor, ___ U.S. at ___, 85 L. Ed.2d at 47.

13. Although there is in the present case no specific statutory authorization for the Council to set minimum wages for apprentices, the Court is of the opinion that this authority can be found within the Council's broad authority to regulate. RCW 49.04.010 empowers the Council to establish standards for apprenticeship agreements and to issue such regulations as are necessary to carry out the intent and purposes of the Apprenticeship Act. One of the specific requirements of the Act is that every apprenticeship agreement contain

a progressively increasing scale of wages to be paid apprentices. RCW 49.04.050(5). Anticompetitive effects could logically result from action taken to implement this broad authority. Similar broad grants of authority have been found by the courts to meet the requirements of the first prong of the Midcal test despite an absence of any express authorization to engage in anticompetitive conduct. Grason Electric, slip opinion 8 (defendant empowered to do all acts necessary and convenient for the full exercise of the powers granted by statute); Llewellyn v. Crothers, 765 F.2d 769, 773 (9th Cir. 1985) (defendant empowered to make all rules which are reasonably required in the performance of his duties). Because anticompetitive effects with respect to wages could logically be expected to result from the exercise of the broad authority granted to

the Council, the Court finds that the first prong of Midcal has been satisfied.

14. It is not clear from the decided cases whether the second prong of the Midcal test is to be applied when the challenged conduct is that of a state agency. The second prong is clearly inapplicable where the conduct is that of a municipality. Town of Hallie v. City of Eau Claire, ___ U.S. ___, 85 L. Ed.2d at 45. The Court is of the opinion that active state supervision should be required only where the challenged conduct is that of private parties acting pursuant to state authorization. See, Southern Motor, ___ U.S. at ___, 85 L. Ed.2d at 45. In cases, such as the instant one, in which the actor is a state agency, active state supervision should not be required. Town of Hallie, ___ U.S. ___, 85 L. Ed.2d at 34 n. 10. Here, the challenged conduct is the adoption and implementation of the wage

parity regulation by the Council. That conduct was not that of private parties acting anticompetitively. The Court is of the opinion that there is no need in the present case for active supervision by the state over and above that supplied by the Council itself. See, Llewellyn v. Crothers, 765 F.2d at 773 (fee limitation supervised by Oregon Workers' Compensation Department).

15. From the foregoing the Court finds that the action of defendants falls within the Parker exemption. In consequence defendants' motion for summary judgment must be granted and plaintiffs' motion must be denied.

16. As the Court has determined that the defendants' motion for summary judgment must be granted, there is no need to address plaintiffs' motion to compel.

Accordingly, defendants'motion for summary judgment is GRANTED. Plaintiffs'

motion for partial summary judgment is DENIED.

The Clerk of this Court is directed to prepare judgment to reflect this ruling of the Court.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 26th day of September, 1985.

/s/ Donald S. Voorhees

UNITED STATED DISTRICT JUDGE

APPENDIX 3

No. 85-4232
D.C. No. CV 83-626V

UNITED STATES DISTRICT COURT
FOR THE NINTH CIRCUIT

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Plaintiffs-Appellants,

vs.

FRANK FORREST, Mac Johnson, Harold Wilson, Lloyd Wilson, Charles Mason, G. David Hutchins, State of Washington, and State of Washington, Department of Labor & Industries, Defendants-Appellees.

Defendants-Appellees.

ORDER

Before: GOODWIN* and BEEZER, Circuit Judges; and Nielsen, District Judge**

The petition for rehearing is DENIED.

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* This case was argued before Judges Kennedy, Beezer and Nielsen. Judge Goodwin

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(Footnotes continued)

was drawn to replace Judge Kennedy. He has read the briefs, reviewed the record and listened to the tape of oral argument held on September 9, 1987.

** The Honorable Leland C. Nielsen, United States District Judge, Southern District of California, sitting by designation.

APPENDIX 4

49.04.010 Apprenticeship council created--Terms--Compensation--Duties. The director of labor and industries shall appoint an apprenticeship council, composed of three representatives each from employer and employee organizations, respectively. The terms of office of the members of the apprenticeship council first appointed by the director of labor and industries shall be as follows: One representative each of employers and employees shall be appointed for one year, two years, and three years, respectively. Thereafter, each member shall be appointed for a term of three years. The governor shall appoint a public member to the apprenticeship council for a three-year term. The appointment of the public member is subject to confirmation by

the senate. Each member shall hold office until his successor is appointed and has qualified and any vacancy shall be filled by appointment for the unexpired portion of the term. The state official who has been designated by the commission for vocational education as being in charge of trade and industrial education and the state official who has immediate charge of the state public employment service shall ex officio be members of said council, without vote. Each member of the council, not otherwise compensated by public moneys, shall be reimbursed for travel expenses in accordance with RCW 43.03.050 and 43.03.060 and shall be compensated in accordance with RCW 43.03.240. The apprenticeship council with the consent of employee and employer groups shall: (1) Establish standards for apprenticeship agreements in conformity with the provisions of this chapter; (2) issue such rules and regulations as may

be necessary to carry out the intent and purposes of this chapter, including a procedure to resolve an impasse should a tie vote of the council occur; and (3) perform such other duties as are hereinafter imposed. Not less than once a year the apprenticeship council shall make a report to the director of labor and industries of its activities and findings which shall be available to the public.

49.04.030 Supervisor of apprenticeship --Duties. Subject to the confirmation of the state apprenticeship council by a majority vote, the director of labor and industries shall appoint and deputize an assistant director to be known as the supervisor of apprenticeship. Under the supervision of the director of labor and industries and with the advice and guidance of the apprenticeship council, the supervisor shall: (1) Encourage and promote the making of apprenticeship

agreements conforming to the standards established by or in accordance with this chapter, and in harmony with the policies of the United States department of labor; (2) act as secretary of the apprenticeship counsel and of state joint apprenticeship committees; (3) when so authorized by the apprenticeship council, register such apprenticeship agreements as are in the best interests of the apprentice and conform to the standards established by or in accordance with this chapter; (4) keep a record of apprenticeship agreements and upon performance thereof issue certificates of completion of apprenticeship; (5) terminate or cancel any apprenticeship agreements in accordance with the provisions of such agreements; and who (6) may act to bring about the settlement of differences arising out of the apprenticeship agreement where such differences cannot be adjusted locally or

in accordance with the established trade procedure.

Related and supplemental instruction for apprentices, coordination of instruction with job experience, and the selection and training of teachers and coordinators for such instruction shall be the responsibility of the commission for vocational education and its local recognized agency for vocational education. The director of labor and industries is authorized to appoint such other personnel as may be necessary to aid the apprenticeship council and the supervisor of apprenticeship in the execution of their functions under this chapter.

49.04.050 Standards for apprenticeship agreements. Standards of apprenticeship agreements are as follows:

(1) A statement of the trade or craft to be taught and the required hours for completion of apprenticeship which shall be not less than two thousand hours of reasonably continuous employment.

(2) A statement of the processes in the trade or craft divisions in which the apprentice is to be taught and the approximate amount of time to be spent at each process.

(3) A statement of the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction which instruction shall be not less than one hundred forty-four hours per year.

(4) A statement of the age of the apprentice which may not be less than sixteen years of age.

(5) A statement of the progressively increasing scale of wages to be paid the apprentice.

(6) Provision for a period of probation during which the apprenticeship council or the supervisor of apprenticeship may terminate an apprenticeship agreement at the request in writing of any party thereto. After the probationary period the apprenticeship council, or the supervisor of apprenticeship, under the procedure approved by the council, shall be empowered to terminate the apprenticeship agreement in accordance with the provisions of such agreement.

(7) Provision that the services of the supervisor and the apprenticeship council may be utilized for consultation regarding the settlement of differences arising out of the apprenticeship agreement where such differences cannot be adjusted locally or in accordance with the established trade procedure.

(8) Provision that if an employer is unable to fulfill his obligation under the

apprenticeship agreement he may transfer such obligation to another employer.

(9) Such additional standards as may be prescribed in accordance with the provisions of this chapter.

APPENDIX 5

WAC 296-04-270 Apprenticeship agreements--Types--Standards--Registration, review, cancellation, reregistration --Certificate of completion. (1) The following apprenticeship agreements shall be recognized pursuant to RCW 49.04.060:

(a) A written agreement between an association of employers and an organization of employees describing the conditions of training for apprentices.

(b) A written statement of an employer or a written agreement between an employer and an employee organization describing the conditions of training apprentices. The former agreement shall be recognized only if there is no bona fide employee organization in the plant affected by the agreement.

(c) A written agreement between an employer and an individual apprentice describing the conditions of apprenticeship.

(2) Apprenticeship agreements shall conform to the following standards:

(a) Committee programs, plant programs, and on-the-job training programs must contain the provisions required by RCW 49.04.050 and, in addition, shall contain:

(i) Provision for nondiscrimination in the selection of apprentices in substantially the following form:

Each sponsor of an apprenticeship program shall include in its standards the following equal opportunity pledge: "The recruitment, selection, employment and training of apprentices during their apprenticeship shall be without discrimination because of race, color, religion, national origin, or sex. The sponsor will take affirmative action to

provide equal opportunity in apprenticeship and will operate the apprenticeship program as required by the rules of the Washington state apprenticeship and training council and Title 29, Part 30 of the Code of Federal Regulations."

(ii) Provision that there shall be no discrimination on the basis of race, color, creed, sex, or national origin after selection during all phases of employment during apprenticeship.

(iii) Provision that adequate records of the selection process must be kept for a period of at least five years and will be made available to the council or its designated representative on request. Such records must include a brief summary of any interviews and the conclusions reached on each of the specific factors which are part of the total judgment concerning each applicant.

(iv) Provision for local committee rules an regulations consistent with these rules and the applicable apprenticeship agreement.

(b) Any proposed standards for apprenticeship must be substantially similar to any standards for apprenticeship already approved by the council for the industry, craft or trade in question to the end that there is general statewide uniformity of such standards in each industry, trade or craft.

(c) The statement of the progressively increasing scale of wages (RCW 49.04.050(5)) shall provide that the entry level wage for all apprentices shall be at least a percentage of the journeymen scale set by the applicable collective bargaining agreement or at least a percentage of the prevailing wage for the craft for the area set by the United States Department of Labor pursuant to the

Davis-Bacon Act (40 USC Sec. 276) where no collective bargaining agreement is in effect. In the event an apprenticeship program is proposed for an area already served by an apprenticeship program, the new program's wage scale shall be identical to or greater than that of an existing program. In the event an apprenticeship program is proposed for a craft or area in which there is no collective bargaining agreement, no Davis-Bacon Act prevailing wage, and no existing apprenticeship program, the applicant shall request the statistician of the department of labor and industries set a prevailing wage for the specific area and craft to be incorporated into the proposed agreement.

(d) A sample apprenticeship agreement which the council approves is available on request from the supervisor.

(3) Registration, review, cancellation, reregistration.

(a) All individual agreements shall be registered with the supervisor and subject to his approval.

(b) The supervisor and his staff, in the performance of their field work, shall conduct a systematic review of all plant and committee programs and shall take appropriate action, including recommendation of cancellation, when they find that any program is not being operated according to these rules and regulations or according to its applicable standards.

(c) When any program is found to be operating in a manner inconsistent with or contrary to these rules and regulations or its established plant or committee program, the supervisor shall notify the offending committee, person, firm or agency of the violation. If the supervisor does not receive notice, within 60 days, of action taken to correct such violations, the supervisor may take whatever action he

deems necessary, including recommendation of cancellation of the apprenticeship or training program and agreement to the council.

(d) If the supervisor deems it necessary to recommend cancellation of an apprenticeship or training program, he shall do so in writing to each council member, stating in detail the reasons for his recommendation. A copy of said recommendation shall be mailed to the last known address of each member of the committee administering said program, or to those persons responsible for said program, together with notice that the council shall consider the recommendation at its next regularly scheduled meeting more than 30 days subsequent to the date of the recommendation and that all interested persons may present evidence or testimony regarding said recommendation. The council shall decide the question before it upon

majority vote of the members present and voting and shall notify all interested parties of its decision, together with the reasons for it, in writing.

(e) The cancellation of any program or agreement shall automatically effect a cancellation of any agreement registered thereunder, provided that any organization or firm not responsible for the violations causing the cancellation may petition the council for approval of such cancelled agreement or program as a new program.

(f) Certificates of completion shall be issued at the request of the appropriate committee. An affidavit of the secretary of the committee concerned shall accompany the request, which affidavit shall state that the apprentice has successfully completed the apprenticeship program of that committee, and that he has been an active, registered participant of that committee's program for at least six months.

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v.

FRANK FORREST, et al.

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 22.6, Petitioner Washington State Electrical Contractors Association, Inc. and other merit shop employers and employer organizations ("Merit Shop Contractors") submit this Supplemental Brief calling attention to this Court's recent decision in Patrick v. Burget, 108 S. Ct. 1658

(1988). This decision, filed on May 16, 1988, is directly applicable to this case, but was not available at the time of the filing of the Peition for Writ of Certiorari.

In Patrick v. Burget, supra, this Court reversed the Ninth Circuit's application of the state action antitrust exemption under Parker v. Brown, 317 U.S. 341 (1943) to a fact pattern remarkably similar to this case. In Patrick, the Ninth Circuit ruled that a hospital peer-review committee with responsibility for revoking hospital privileges, was protected from antitrust liability by the state action doctrine. There, as here, an agency comprised of private parties claimed to be authorized by state law to engage in anticompetitive activity. There as here, there was no evidence of actual active state supervision

of this anticompetitive conduct by any state actors. Yet, there as here, the Ninth Circuit determined that potential review by state agents constituted sufficient "active state supervision" of the private anticompetitive activity.

In reversing, this Court attacked the Ninth Circuit's conclusion that the potential for state supervision of a hospital peer-review process was sufficient.

> Respondents in this case contend that the State of Oregon actively supervises the peer-review process through the state Health Division, BOME, and the state judicial system. The Court of Appeals, in finding the active supervision requirements satisfied, also relied primarily on the powers and responsibilities of the state actors. Neither the Court of Appeals nor Respondents, however, have succeeded in showing that any of these actors reviews -- or even could review -- private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses.

108 S. Ct. at 1663 (emphasis supplied).

This Court went on to hold that the "active state supervision" requirement requires a showing, not only of authority to supervise by a state agency, but also evidence of actual supervision. Id. at 1664-65. "The mere presence of some state involvement or monitoring does not suffice." Id. at 1663. In examining alleged supervision of the private party members of the hospital peer-review committee by the Bureau of Medical Examiners for the State of Oregon ("BOME"),[1] the Court held:

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[1] The Court expressed no opinion as to whether the Board of Medical Examiners constituted a "state agency" which was immune from antitrust liability since the petition for Writ of Certiorari did not raise this issue. 108 S. Ct. at 1662, n. 4.

> Similarly, the BOME does not engage in active supervision over private peer-review decisions. . . . Certainly, respondents have not shown that the BOME in practice reviews privilege decisions or that it ever has asserted the authority to reverse them.

108 S. Ct. at 1664.

In the present case, the Ninth Circuit relied upon the same erroneous construction of the "active state supervision" requirement. Indeed, the Ninth Circuit expressly relied upon its now-reversed decision in Patrick v. Burget. The Ninth Circuit determined that the mere presence of an appointed supervisor of apprenticeship on the Washington State Apprenticeship Training Council constituted the requisite "active state supervision." Like Patrick v. Burget, however, the Ninth Circuit pointed to no evidence of actual supervision.

It was undisputed that respondents Union Appointees to the Washington State Apprenticeship Training Council ("Union Appointees") prepared the price-fixing regulation at issue requiring Merit Shop Contractors to pay union wage rates to their apprentices in order to obtain state approval of their program. There is no evidence of any action by, or even authority of, the supervisor of apprenticeship to reject this price-fixing scheme in the event it did not comport with state policy.

More importantly, there is no evidence that the supervisor reviewed or rejected the resulting union apprentice wages which set state-wide wage standards for apprentices. As discussed in the Petition for Writ of Certiorari, the Respondents, through their counsel, openly admitted that

the State could not and did not review these wages which were fixed by private parties.

Even if the Ninth Circuit correctly held that the supervisor of the apprenticeship had potential authority to reject privately negotiated union wage rates which, in turn, fixed Merit Shop Contractors' apprentice wage rates, the Ninth Circuit failed to require a showing that such active acceptance or rejection of union wage rates based upon state policy actually occurred. Indeed, the undisputed facts are that such supervision did not occur. As a result, the Court's reversal of the Ninth Circuit's holding in Patrick v. Burget is directly applicable and supports the granting of a petition for Writ of Certiorari.

For the foregoing reasons, as well as those set forth in Merit Shop Contractors' Petition for Writ of Certiorari, Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit. At the very least, the Court should remand the case to the Ninth Circuit for reconsideration in light of the recent Patrick v. Burget decision.

RESPECTFULLY SUBMITTED this 30th day of June, 1988.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether authorized rule-making activity by the Washington State Apprenticeship Training Council, taken pursuant to a clearly articulated state policy to displace competition with a regulatory scheme, is exempt from federal antitrust laws.

2. Whether state laws which displace competition and establish a specific, detailed and comprehensive regulatory scheme for apprenticeship training constitute a clear articulation of state policy sufficient under *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny to protect from antitrust scrutiny the activities of state officials consistent with such regulatory scheme.

3. Whether persons who are appointed by state officials pursuant to specific legislative authority in order to engage in state regulatory and rule-making activity constitute state officials or agents for purposes of *Parker v. Brown* immunity from federal antitrust law.

4. Whether the regulatory and rule-making activities of the WSATC are actively supervised by the state.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

This action was brought by a group of non-union contractors and contractor associations (hereinafter "Contractors") to undercut important Washington State policy in favor of effective regulation of apprentice training. Although disguised as an antitrust treble-damages action, the Contractors' lawsuit in reality is an effort to obtain judicial repeal of regulatory protections which currently are afforded to apprentices in training programs which have received state approval.

The Contractors have sued six individuals who at different times have served as appointed members of the statutorily created Washington State Apprenticeship Training Council. They also have sued the State itself and the state Department of Labor and Industries, which is, pursuant to statute, the parent body for the Council.

Since 1941, the State of Washington has extensively regulated apprentice training in an effort to promote training in the skilled trades such as carpentry, plumbing and the electrical trade. Before state regulation of apprentice training, young people seeking training and experience in skilled trades were exploited as a source of cheap labor, often at inadequate wages and without any meaningful training or opportunities for advancement. The state regulatory program is designed to establish and maintain standards of apprentice training programs so that the programs are an attractive and rewarding opportunity for young people in the labor force. *See* Wash. Rev. Code § 49.04.050 (Pet. App. 4, at 51a-54a). The state legislature specifically has designated apprentice wages as an appropriate area for regulation. Wash. Rev. Code § 49.04.050 (5) (Pet. App. 4, at 52a).

State approval and regulation of apprenticeship programs is voluntary; no state law or regulation precludes the Contractors from establishing such programs without state approval. State approval amounts to a form of accreditation for programs meeting or exceeding the minimum standards established by the state.

State approval also confers an important benefit on those whose training programs meet or exceed regulatory standards. For the State of Washington has a "little Davis Bacon Act" which provides that, on state and local public works projects, skilled labor must be paid the prevailing journeyman wage. *See* ch. 39.12 Wash. Rev. Code, especially §§ 39.12.020 and 39.12.021. Apprentices in approved training programs, however, may be paid less than prevailing journeyman rates, but must be paid at least the prevailing hourly rate for apprentices in that trade. Wash. Rev. Code § 39.12.021.[1] Thus, contractors who employ ap-

prentices from approved training programs can pay such apprentices prevailing apprentice wages rather than the more costly journeyman wage.

The rule challenged by the Contractors, Wash. Admin. Code 296-04-270(2)(c), was adopted by the Council in order to protect against economic exploitation of apprentices on work which was not covered by the state "little Davis Bacon Act." The part of the rule about which the Contractors complain requires any new programs in an area and craft already served by an apprenticeship program to pay a wage scale identical to or greater than that of the existing program.[2]

Because in most instances existing programs are union-sponsored, the wages for such programs and consequently the apprentice wages invoked by the rule for each trade or craft often are determined by the collective bargaining process for journeyman wages. The Council and its members do not control or influence such wage negotiations. The journeyman wages which form the basis for apprentice wage scales in existing programs and, pursuant to the rule, for wage scales in any new programs for the same trades and crafts, are thus determined by free market

---

[1]This provision reads as follows:

Apprentice workmen employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any workman for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journeyman, and, therefore, shall be paid at the prevailing hourly rate for journeymen.

[2]General statewide uniformity among the various apprentice training programs for each skill and craft is an important regulatory policy. Accordingly any new programs must adopt standards for training which are "substantially similar" to previously-approved programs. Wash. Admin. Code 296-04-270(2)(b) (Pet. App. 5, at 58a) General uniformity of training standards and wage scales promotes the attractiveness of approved programs to apprentices, who may be called upon to relocate frequently during their apprenticeship. The regulatory standards give assurances that the same opportunities for training and economic rewards are available statewide.

forces in the market for skilled labor, as those forces operate in the collective bargaining process.

Historically, such journeymen wages have been negotiated at levels which provide a basis for an adequate progressive scale of wages for apprentices. The effect of the rule is to take this competitively-determined wage and use it as a basis for establishing minimum apprentice wages for projects not covered by Washington's "little Davis Bacon Act."

What the Contractors seek through this action is the ability to obtain state approval for an apprenticeship program that will qualify them to pay apprentices on public works less than prevailing journeyman wages, while retaining the ability to pay substandard wages to apprentices on private works. To avoid this inequity and degradation of apprentice training, the challenged rule requires contractors who enjoy the benefits of state approval when they employ apprentices on public works to meet wage-protection requirements for apprentices on private works.

The Contractors are, as previously noted, legally free to disregard these wage-protection requirements for apprentices on private works. And even if they disregard these requirements, they still are legally free to compete for state and local public works. But they incur a cost disadvantage in competing for public works, *i.e.*, the requirement that they pay journeyman wages to their apprentices.

The State, in short, is merely using its control over public works to provide an incentive for those who would do business with it (and with local governments) to avoid substandard wages for apprentices on private works as well. While the State, through this method, is displacing competition with a regulatory scheme, that displacement is certainly modest and minimal.

Ruling on cross-motions for summary judgment, the district court held that adoption of the challenged rule was exempt from federal antitrust law under the *Parker v. Brown* doctrine. The court specifically ruled that the Council acted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with

regulation in the area of apprenticeship and apprentice wages. (Pet. App. 2, at 39a-42a). The district court further ruled that because the actor in this case was a state agency, active supervision was not required.

The Ninth Circuit affirmed, holding that the wage-protection rule is a "foreseeable result" of the Council's legislatively delegated responsibilities and that the Council's activities were monitored and supervised by the state. The court declined to decide whether the Council was a state agency for purposes of *Parker v. Brown* analysis. The Contractors' petition for rehearing was denied and they now seek a writ of certiorari from this Court.

ARGUMENT

A. The Council And Its Members Are State Officials Whose Activities Have Promoted State Policy.

It has long been held that the federal antitrust laws were not intended to apply to the state nor to restrain state officers or agents from activities directed by a legislature, even though such activities would restrict or otherwise regulate competition. *Parker v. Brown*, 317 U.S. 341 (1943).

Petitioner merit shop contractors attempt to circumvent this fundamental principle by asserting that the Council acted not as state officials, but as a group of private individuals guided by private interests in conflict with the public interest. The district court expressly rejected this assertion and the Ninth Circuit declined to characterize the respondent Council members as private actors. The district court ruled that this action challenged the activities of a state agency, not private parties. (Pet. App. 2 at paragraphs 3 and 14).

The Washington State legislature has clearly established the Council as a state agency with delegated legislative authority in the area of apprenticeship regulations. In the statute which creates and empowers the Council to act,

the legislature grants to the Council regulatory authority to establish standards for apprenticeship agreements and to issue "such rules and regulations as may be necessary to carry out the intent and purposes" of the Apprenticeship Act. Wash. Rev. Code 49.04.010 (Pet. App. 4, at 47a). The council also is obligated to submit a public annual report to the Director of Labor and Industries about its activities and findings. (*Id.* at 49a).

In the same statutory provision the legislature directs that 7 representatives be appointed: 3 representatives of employee organizations, 3 representatives of employer organizations and 1 public member. Historically, representatives of trade unions have been appointed to the positions reserved for employee organization representatives because trade unions clearly qualify as employee organizations within the meaning of the statutory provision.

Thus, the legislature has established a Council with balanced interests and specific expertise to implement state regulatory policy for apprentices, with accountability to the public and the Director of Labor and Industries. By virtue of this enabling legislation and the accountability requirements thereunder, the Council is a state agency and its members unmistakably are acting as state officials for purposes of *Parker v. Brown* analysis.

Application of an active supervision requirement is crucial to the success of the contractors' argument. However, not only has this argument failed in the two lower courts, but also it flies in the face of the most recent pronouncements from this Court on the issue. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, at 46 (1985), this Court held that the active supervision requirement should not be imposed in cases in which the actor is a municipality. The Court reasoned that little danger exists in such cases that the municipality would be involved in private price-fixing arrangements. In a logical extension of this reasoning, the Court suggested the appropriate rule in this case, stating that "in cases in which the actor is a state agency, it is likely that active state supervision would also not be required . . ." *Town of Hallie*, 471 U.S. at 46, n.10.

B. The Activities At Issue Here Present No Danger Of Anticompetitive Abuse And Do Not Require Additional Supervision.

The reasoning in *Town of Hallie* that supervision of municipalities was not required depended in part on the observation, equally applicable here, that the public exposure of municipalities provides greater protection against antitrust abuses than exists for private actors. *Town of Hallie*, 471 U.S. at 45.

The Council's conduct at issue here was the public adoption of the so-called wage-parity rule at a public meeting. After extensive discovery in this action, the Contractors were unable to persuade the district court that the Council members had acted in any manner inconsistent with their status as state officials, advancing state regulatory policy. (Pet. App. 2 at paragraph 14).

As in *Town of Hallie*, there is little danger that a public rule-making body, such as the Council and its members, would be engaged in a private price-fixing arrangement. The Contractors offer no basis for overturning the rulings of the lower courts that the Council acted lawfully in the context of a comprehensive regulatory scheme and in a manner consistent with express state regulatory policy. Instead, the Contractors make a false comparison between the rulemaking activity here and the private conduct challenged in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

When the Contractors' price-fixing rhetoric is penetrated, however, it is clear that the rule-making activities under challenge here differ significantly from the activities challenged in those actions. In each of those cases the activities for which state action immunity was claimed presented clear dangers of anticompetitive abuse. *Midcal Aluminum* (resale price maintenance by producers and distributors); *Southern Motor Carriers* (horizontal rate fixing by motor common carriers); and *324 Liquor Corp.* (resale price maintenance by liquor distributors). In this

case the challenged conduct, *i.e.* Council adoption of the wage parity rule, presents no such dangers. Contrary to the Contractors' conclusory allegations, the rules do not enforce a private price-fixing arrangement.

Unlike *Midcal*, *Southern Motor Carriers* and *324 Liquors*, where the state enforced private price-fixing arrangements, in this case no private parties control the journeyman wages which form the basis for the "progressively increasing scale of wages" for apprentices.

A brief explanation will clarify this important point. The wage-parity rule establishes a four-part standard for apprentice wages. The rule requires entry level wages for apprentices to be a percentage of the journeyman scale set by the applicable collective bargaining agreement or the Davis-Bacon Act wage where no collective bargaining wage is in effect. For a new apprenticeship program in an area and trade already served by an existing program the new program's wage scale must match or exceed the existing program's scale. Lastly, if there is no applicable collective bargaining agreement, no applicable Davis-Bacon Act wage and no existing apprenticeship program, then the statistician at the state Department of Labor and Industries sets the prevailing wage. Wash. Admin. Code § 296-04-270(2)(c) (Pet. App. 5, at 58a-59a).

Most apprentice training programs in Washington were established years ago by trade unions in the collective bargaining context. Consequently, the controlling wage scale for most new programs is that used in the existing programs, *i.e.* the collective bargaining journeyman scale.

This process for establishing minimum wages for apprentices presents none of the dangers of anticompetitive abuses that were present in *Midcal*, *Southern Motor Carriers* and *324 Liquors*. The collective bargaining journeyman wages are not controlled by private parties, nor can they be manipulated in an anticompetitive manner. Such wages are set by a process of adversarial, arms-length bargaining between labor and management in a highly competitive environment. No labor unions control such wages and no members of the Council can influence such wages.

The private conduct challenged in *Patrick v. Burget*, ___ U.S. ___, 108 S. Ct. 1658 (1988) is likewise not comparable to the rulemaking activity here. In *Patrick*, the actors were private physicians acting as a peer review group for a private hospital. They were not state officials acting under governmental authority, there was no delegation of legislative authority, and the actors had no rule making power or public accountability. In short, the rule of *Patrick*, concerning supervision of private actors is inapplicable here.[3]

The Contractors' real complaint is not that they are injured by the anticompetitive activities of private parties, but rather that apprentice training regulation denies them the opportunity to reduce and suppress apprentice wages. Price-fixing rhetoric aside, it is clear that the Contractors simply object to the state's policy of regulating apprentice wages. Instead of challenging that policy in the legislature, the Contractors have pursued this ill-fated antitrust action. After dismissal in the district court and affirmance on appeal, this action now is reduced solely to an attack based on the status of 3 members of the 6 member Council which adopted the wage-parity rule.

C. **The Council's Challenged Activities Are Consistent With Clearly Articulated And Affirmatively Expressed State Policy.**

In Wash. Rev. Code Chapter 49.04, the State of Washington has established an elaborate and comprehen-

[3]Even though imposition of an active supervision requirement is inappropriate here because the Council and its members are not private actors, such requirement is satisfied by the supervision inherent in the state's regulatory program, of which the Council is a part. The regulatory program is not administered by the Council, but by a state official, the Supervisor of Apprenticeship who acts with the advice and guidance of the Council. The supervisor is appointed by and responds directly to the Director of Labor and Industries. Wash. Rev. Code 49.04.030 (Pet. App. 4, at 49a-51a). The Supervisor and his staff directly monitor the activities of approved programs to ensure compliance with regulatory requirements. Further, the Supervisor has authority to reject any apprenticeship agreements and to recommend to the Council cancellation of any program. Wash. Admin. Code 296-04-270(3)(a) and (3)(d). (Pet. App. 5, at 59a-62a). The Council itself prepares a public annual report to the Director of Labor and Industries about its activities and findings. Wash. Rev. Code 49.04.010(*Id.* at 49a).

sive scheme for the regulation of apprenticeship in the State of Washington. While registration of apprenticeship programs is voluntary, Wash. Rev. Code § 49.04.070, those seeking the benefits of registration and approval must follow the regulatory scheme which focuses upon the establishment of program standards for the various crafts and trades. Among the many areas which the Legislature directed the Apprenticeship Council to regulate was "a statement of the progressively increasing scale of wages to be paid the apprentice." Wash. Rev. Code § 49.04.050(5). (Pet. App. 4, at 51a-52a). Accordingly, apprentice wages are specifically identified as a subject for regulatory standards.

Both the district court and the Ninth Circuit ruled unequivocally that the Council's adoption of the wage-parity rule is consistent with the state policy in favor of apprentice regulation, including regulation of wage scales. (Pet. App. 2 at paragraph 13 and App. 1 at 20a-21a, respectively).

Although the Contractors acknowledge the legislative reference to apprentice wages as an appropriate area for the development of regulatory standards, they contend that because the legislature failed to specifically articulate the concept of minimum wages, the Council's adoption of the wage-parity rule is unsupported by state policy.

This Court has never required such precise specificity for the legislative enactments which restrict competition. Wisely recognizing the practical realities of government through administrative agencies, this Court has emphasized that such detailed specificity is not needed to satisfy the "clear articulation" prong of the state action test. In *Southern Motor Carriers, supra*, this Court held:

> that if the State's intent to establish an anticompetitive regulatory program is clear, * * * the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws. 471 U.S. at 65.

Accordingly, the State's clearly expressed intent to displace competition with a comprehensive regulatory program for apprenticeship training plainly is sufficient to

protect from antitrust scrutiny the Council's acts consistent with that intent.

CONCLUSION

The decision below is in all respects consonant with this Court's decisions regarding application of the *Parker v. Brown* doctrine. The conduct challenged in this case is the rule-making activities of state officials, not private price-fixing arrangements. The state legislature has directly delegated rule-making authority to the Council pursuant to a clearly articulated state regulatory policy and has specifically directed the Council to establish standards for apprentice wage scales. The rule adopted by the Council is within the scope of the delegated legislative authority and consistent with the state's comprehensive regulatory scheme. The rule does not enforce a private price-fixing arrangement. Instead, the rule employs, for some new apprenticeship programs, a competitively-set collective bargaining wage as a minimum basis for apprentice wages.

Accordingly, the Ninth Circuit's reliance on the rule of *Town of Hallie* and *Southern Motor Carriers* is correct and provides no basis or need for a writ of certiorari. The petition should be denied.

Respectfully submitted,

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